FILE COPY

FILED
APR 9 1928
CHARLES ELMORE CROPLEY
CLERK

Original Number 16.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927.

EX PARTE: IN THE MATTER OF THOMAS E. WILLIAMS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., PETITIONERS.

BRIEF OF PETITIONERS.

O. S. SPILLMAN, Attorney General of Nebraska,
GEORGE LEE BASYE, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.

WEBSSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

INDEX.

SUBJECT INDEX

Jurisdiction of the Supreme Court of the United States 1
Tax Commissioner is a state officer..... 2
The Tax Commissioner, having been made a defendant, the court has jurisdiction..... 2
The County Treasurer is an officer of the state within the meaning of the U. S. Code, Title 28, Sec. 380... 3-8

CONSTITUTION, FEDERAL STATUTES AND STATE STATUTES CITED

United States Code, Title 28, Sec. 342..... 1
United States Code, Title 28, Sec. 377..... 1
United States Code, Title 28, Sec. 380.....1, 3, 5
Constitution of Nebraska, Art. IV, Sec. 28..... 2
Sec. 5055, Compiled Statutes Neb., 1922..... 6
Sec. 5057, Compiled Statutes Neb., 1922..... 6
Sec. 5840, Compiled Statutes Neb., 1922..... 7
Sec. 5996, Compiled Statutes Neb., 1922..... 5
Sec. 6010, Compiled Statutes Neb., 1922..... 8
Sec. 6035, Compiled Statutes Neb., 1922..... 7
Sec. 6042, Compiled Statutes Neb., 1922..... 6
Sec. 6043, Compiled Statutes Neb., 1922..... 6

CASES AND OTHER AUTHORITIES CITED

Connecting Gas Co. v. Imes, Co. Treas. et al., 11 Fed. (2d) 191 5
Conroy v. Hallowell, 94 Neb. 804..... 3
Cumberland Tel. & Tel. Co. v. Louisiana Pub. Ser. Com., 260 U. S. 43..... 2
Donahue v. County of Will et al., 100 Ill. 94..... 3

Ex-parte Metropolitan Water Co., 220 U. S. 539..... 1
Ex-parte United States, 242 U. S. 27..... 1

Hart v. Keith Vaudeville Exchange, 262 U. S. 271.... 2

In re William T. Tate, 63 N. C. 303..... 4

Lancaster Co. et al. v State of Neb., 74 Neb. 211-215... 7
12 Opinions of Attorney General, p. 204, Sec. 12..... 5

Prendergast v. New York Telephone Co., 262 U. S. 43.. 2

22 Ruling Case Law, p. 386, "Public Officers," Sec. 19.. 4

Silvey v. Comm. of Montgomery Co., Ohio, 273 Fed. 202 9
Smith v. Wilson, 273 U. S. 388..... 9
Steele v. United States, 267 U. S. 505..... 4

Travis Co. v. Jourdan, 91 Tex. 217, 42 S. W. 543.... 4

U. S. v. Powell, 27 Fed. Cases 605, No. 16079..... 4

Walker v. Bus, 135 Mo. 325, 33 L. R. A. 616..... 4
Worthy v. Barrett, 63 N. C. 199..... 4

Original Number 16.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927.

EX PARTE: IN THE MATTER OF THOMAS E. WILLIAMS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., PETITIONERS.

BRIEF OF PETITIONERS.

O. S. SPILLMAN, Attorney General of Nebraska,
GEORGE LEE BASYE, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.

I.

The jurisdiction of this court is invoked under United States Code, Title 28, Section 342, United States Code Title 28, Section 377, United States Code, Title 28, Section 380.

The following cases sustain the jurisdiction of this court:

Ex parte Metropolitan Water Company, 220 U. S. 539.

Ex parte United States, 242 U. S. 27.

Cumberland Telephone & Telegraph Company v. *Louisana Public Service Commission*, 260 U. S. 212.

Prendergast v. *New York Telephone Company*, 262 U. S. 43.

II.

The tax commissioner of Nebraska, a defendant, is a state officer. *Constitution of Nebraska*, Article IV., Sec. 28, which is as follows:

> "A Tax Commissioner shall be appointed by the Governor with the advice and consent of the Senate. He shall have jurisdiction over the administration of the revenue laws of the state, and together with the Governor, Secretary of State, State Auditor and State Treasurer shall have power to review and equalize assessments of property for taxation within the state. He shall have such other powers and perform such other duties as the Legislature may provide. His term of office and compensation shall be as provided by law."

The Tax Commissioner is not a formal party. It seems clear that the Tax Commissioner has the right to initiate suits for the enforcement of the tax laws of the state. He is a proper party.

III.

The plaintiff treated the tax commissioner as a proper party and asked affirmative relief against him (Prayer of Petition, par. 4; Petition herein, pp. 75-76). The plaintiff prayed for a temporary injunction (Petition herein, p. 75) against all defendants. There was no objection by the defendants to the joining of the Tax Commissioner as a defendant. The averments of the bill gave the court jurisdiction.

Hart v. *Keith Vaudeville Exchange*, 262 U. S. 271.

IV.

County treasurers are officers of the state within the meaning of United States Code, Title 28, Sec. 380.

Several cases are cited in the return to show that county officers are not state officers.

Travis County v. *Jourdan*, 91 Tex. 217, 42 S. W. 543, is cited in the return.

In that case the Supreme Court of Texas in considering a statute concerning "officers of the state government," said:

> "Counties are but political subdivisions of the state, and most of the officers of a county perform functions for the state, and are, in a certain sense, state officers (citing cases). But it does not follow that they are 'officers of the state government' within the meaning of the article just quoted."

In *Donahue* v. *County of Will et al.*, 100 Ill. 94, cited in the return, a county treasurer was held not to be a county officer. That case is cited in *State* v. *Olson*, 15 Neb. 247. The question there involved concerned the ousting of a county officer and *Donahue* v. *County of Will et al., supra*, was cited. The court had misgivings as to its soundness; the judge who wrote the opinion said of it:

> "I think upon a careful consideration of the whole subject, that it is safe to follow this precedent, though that the case is entirely free from doubt cannot be said."

Donahue v. *County of Will, et al.*, was also doubted in *Conroy* v. *Hallowell*, 94 Neb. 804.

It is well recognized that the terms "state officers" and "officers under a state" are used in two senses. In a

popular sense they mean those whose jurisdiction is co-extensive with the state. In a legal sense, which is more enlarged, they mean officers who receive their authority from the state and perform functions of the state.

22 R. C. L. p. 386, "Public Officers," Sec. 19.

Walker v. *Bus*, 135 Mo. 325, 33 L. R. A. 616.

Travis v. *Jourdan*, *supra*.

The cases cited in the return are all state cases based upon state constitutions and state statutes. They can throw little, if any, light on the meaning of the Federal statute now under consideration. The use of the expression, "officer of the United States" in the Federal Statutes sometimes has an enlarged meaning.

Steele v. *U. S.*, 267 U. S. 505.

The instant case involves the use of the expression "officer of such state" in a Federal statute in connection with the enforcement of an order of a state board. The expression "officer of any state" is contained in Section 3 of the Fourteenth Amendment to the Federal Constitution. It has been considered by the courts to have a broad meaning and to include county officers.

In *Worthy* v. *Barrett*, 63 N. C. 199, it was held that the office of sheriff was within the meaning of the Fourteenth Amendment.

In re William T. Tate, 63 N. C. 303, held that a county attorney was also within the provisions of the Fourteenth Amendment.

United States v. *Powell*, 27 Fed. Cases 605, No. 16079, was a prosecution for accepting the office of sheriff when disqualified under the Fourteenth Amendment and the statute enacted thereunder. It was held (Syl. par. 1):

"One who, as constable of a county in North Carolina, took an oath to support the Constitution of the United States, and afterwards engaged in the Rebellion, is disqualified by the fourteenth amendment, unless relieved in the manner provided, to hold any office, state or national, and is therefor indictable under Section 15 of the Act of May 31, 1870 (16 Stat. 140), for subsequently accepting the office of sheriff."

In considering the Reconstruction Acts the Attorney General of the United States, in advising the President, June 12, 1869, 12 Opinions of Attorney General 182 (Sec. 12, p. 204) said:

"All the executive or judicial officers of any State, who took an oath to support the Constitution of the United States, are subject to disqualification, and in these I include county officers, as to whom I made a reservation in the opinion heretofore given. After full consideration, I have arrived at the conclusion that they are subject to disqualification, if they were required to take, as a part of their official oath, the oath to support the Constitution of the United States."

In view of these authorities it is clear that the decision in *Connecting Gas Co.* v. *Imes, County Treasurer, et al.*, 11 Fed. 2d. 191, cited in the return, gives too narrow a construction to United States Code, Title 28, Section 380, now under consideration.

County treasurers perform the functions of state officers in collecting state taxes. Section 5996, Compiled Statutes of Nebraska for 1922, provides:

"The county treasurers of the several counties of this state shall be ex-officio county collectors of all taxes levied within their respective counties. No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

They are required to give bond. Section 5055, Compiled Statutes of Nebraska for 1922 provides, in part, as follows:

> "The following named officers shall give bond with penalties of the following amounts, to-wit: * * * each county treasurer not less than ten thousand dollars and not less than the amount of money that may come into his hands, to be determined by the county board; * * *."

The bond given by the county treasurer is to protect state funds as well as other funds. Section 5057, Compiled Statutes of Nebraska for 1922 provides, in part:

> "Any officer or person who is intrusted with funds belonging to the state or any county thereof, which may come into his possession by any appropriation or otherwise, shall be responsible for the same upon his bond. * * *"

Section 6042, Compiled Statutes of Nebraska for 1922 provides as follows:

> "The bond of every county treasurer shall be held to be security for the payment by such treasurer to the state treasurer and the several cities, towns, villages and the proper authorities and persons, respectively, of all taxes and special assessments which may be collected or received by him on their behalf, by virtue of any law in force at the time of giving such bond, or that may be passed or take effect thereafter."

Section 6043, Compiled Statutes of Nebraska for 1922, is as follows:

> "Upon the failure of any county treasurer to make settlement with the auditor, the auditor shall sue the treasurer and his surety upon the bond of such treasurer, or sue the treasurer in such form as may

be necessary, and take all such proceedings, either upon such bond or otherwise, as may be necessary to protect the interest of the state."

The times of payment of funds held by county treasurers into the state treasury is provided in Section 6035, Compiled Statutes of Nebraska for 1922, which is as follows:

"The treasurers of the several counties shall pay into the state treasury all funds in their hands belonging thereto on or before the tenth day of each month, and at such other times as the state treasurer shall require, and the sums so paid in shall be the identical state warrants, if any received by the treasurer for payment of the taxes, or in coin or in treasury notes of the United States."

If the state funds are lost, the state, and not the county, is the loser.

Lancaster Co. et al. v. *State of Neb.*, 74 Neb. 211-215.

In that case it was held that state taxes in the hands of a county treasurer are the property of the state and if lost without fault of the county, the county is not liable to the state therefor.

Railroads are assessed as personal property. Section 5840, Compiled Statutes of Nebraska for 1922 is as follows:

"The board on the first Monday of May of each year shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, roadbed, right-of-way and depot grounds, and all water and fuel stations, buildings and super-structures thereon, and all machinery, roll-

ing stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with franchises and all other property of such railroad company used or held for the purpose of operating its road, and appraise and assess the same as personal property as herein provided."

County treasurers are required to issue distress warrants in collecting personal taxes, including state taxes. Section 1010, Compiled Statutes of Nebraska for 1922 is as follows:

"The county treasurer is hereby required, during the month of December of each year after the personal taxes for the year have become delinquent, to notify by mail all persons of the amount of their delinquent personal tax, and that unless the same is paid by February first next following, distress warrant will be issued therefor. The treasurer shall, on and after the first day of February next after the personal taxes for the last preceding year have become delinquent, collect the same, together with interest and costs of collection, by distress and sale of personal property belonging to the person against whom levied in the manner provided by law for the levy and sale of personal property on execution. Distress warrants shall be issued against all persons having delinquent personal tax for each year, and each such warrant shall include all delinquent personal taxes of the person against whom issued, unless such person shall, on or before February 1st, file with the treasurer an affidavit that he is unable, by reason of poverty, to pay any such tax, in which case distress warrants shall not issue until ordered by the county board."

V.

Several cases are cited in the return where interlocutory injunctions have been issued in cases where the

officers affected did not exercise state-wide authority. To the list should be added these cases where such injunctions were denied, but jurisdiction was not questioned.

Silvey v. *Commissioners of Montgomery County, Ohio, et al.*, 273 Fed. 202.

Smith v. *Wilson*, 273 U. S. 388.

Petitioners pray that the rule be made absolute.

O. S. SPILLMAN, Attorney General,
GEORGE LEE BABYR, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.

Original Number 16.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927.

EX PARTE: IN THE MATTER OF THOMAS E. WILLIAMS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., PETITIONERS.

SUPPLEMENTAL APPENDIX TO PETITION.

O. S. SPILLMAN, Attorney General of Nebraska,
GEORGE LEE BASYE, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.

The petitioners add to their petition, as a supplemental appendix thereto the following, being a copy of the bond for the temporary order of injunction and certain sections of the Statutes of Nebraska in force in 1922, and which are still in force. The sections quoted are all from the 1922 Compiled Statutes of Nebraska.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEBRASKA
OMAHA DIVISION.

Chicago, Burlington & Quincy Railroad Company, Plaintiff, vs. William H. Smith, as Tax Commissioner of the State of Nebraska, et al., (names other defendants omitted).	628 Equity

---

BOND FOR TEMPORARY INJUNCTION ORDER.

KNOW ALL MEN BY THESE PRESENTS: That we, Chicago, Burlington & Quincy Railroad Company, as principal, and the United States Fidelity & Guaranty Company, as surety, are hereby held and firmly bound unto the defendants, and each of them, and the successors in office and each of them in the penal sum of $1000.00 for the payment of which, well and truly to be made, we hereby bind ourselves jointly and severally, firmly by these presents subject to the following conditions:

WHEREAS, in this action on the 21st day of November, 1923, there has been issued upon the application of the plaintiff the temporary injunction order of this court enjoining the defendants, and each of them, and all persons acting by, through or under them, or any of them, including deputies, agents and attorneys from in any manner demanding or collecting, or attempting to collect taxes by distress warrants, suits, or otherwise, from the plaintiff on any of its property in excess of 75 per cent thereof, except city and village tax.

NOW THEREFORE, if upon the final determination of said action it shall be found that said temporary injunction order was wrongfully or improperly issued, then the above bounded shall pay all costs and damages as may be incurred or suffered by any party on account thereof, and if it shall be determined that any portion of the amount which the defendants herein are by said order enjoined from collecting, was properly assessable against the defendant, it shall pay thereon an amount equal to all manner of taxes levied upon its like property at the rates for 1923 taxation with an amount equal to any interest and penalties assessable against delinquent taxes of like character, as may be determined by this court. Then this obligation to be null and void, otherwise to be and remain in full force and effect.

Dated this 21st day of November, 1923.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Principal,

BY BYRON CLARK,
Its Solicitor.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Surety.

[SEAL]

BY HENRY BUSH,
Its Attorney in Fact.

The above bond is hereby approved as to form and surety and filed this 21 day of November, 1923.

J. W. WOODROUGH,
District Judge.

Endorsed: Filed Nov. 21, 1923.
R. C. HOYT, *Clerk*.

Section 5996, Compiled Statutes of Nebraska for 1922, provides:

> "The county treasurers of the several counties of this state shall be ex-officio county collectors of all taxes levied within their respective counties. No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

Section 5055, Compiled Statutes of Nebraska for 1922, provides, in part, as follows:

> "The following named officers shall give bond with penalties of the following amounts, towit: * * * each county treasurer not less than ten thousand dollars and not less than the amount of money that may come into his hands, to be determined by the county board; * * *"

Section 5057, Compiled Statutes of Nebraska for 1922, provides in part:

> "Any officer or person who is intrusted with funds belonging to the state or any county thereof, which may come into his possession by any appropriation or otherwise, shall be responsible for the same upon his bond. * * *"

Section 6042, Compiled Statutes of Nebraska for 1922, provides as follows:

> "The bond of every county treasurer shall be held to be security for the payment by such treasurer to the state treasurer and the several cities, towns, villages and the proper authorities and persons, respectively, of all taxes and special assessments which may be collected or received by him on their behalf, by virtue of any law in force at the time of giving such bond, or that may be passed or take effect thereafter."

Section 6043, Compiled Statutes of Nebraska for 1922, is as follows:

"Upon the failure of any county treasurer to make settlement with the auditor, the auditor shall sue the treasurer and his surety upon the bond of such treasurer, or sue the treasurer in such form as may be necessary, and take all such proceedings, either upon such bond or otherwise, as may be necessary to protect the interest of the state."

Section 6035, Compiled Statutes of Nebraska for 1922, is as follows:

"The treasurers of the several counties shall pay into the state treasury all funds in their hands belonging thereto on or before the tenth day of each month, and at such other times as the state treasurer shall require, and the sums so paid in shall be the identical state warrants, if any, received by the treasurer for payment of the taxes, or in coin or in treasury notes of the United States."

Section 5840, Compiled Statutes of Nebraska for 1922, is as follows:

"The board on the first Monday of May of each year shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, roadbed, right-of-way and depot grounds, and all water and fuel stations, buildings and super-structures thereon, and all machinery, rolling-stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with franchises and all other property of such railroad company used or held for the purpose of operating its road, and

appraise and assess the same as personal property as herein provided."

Section 6010, Compiled Statutes of Nebraska for 1922, is as follows:

"The county treasurer is hereby required, during the month of December of each year after the personal taxes for the year have become delinquent, to notify by mail all persons of the amount of their delinquent personal tax, and that unless the same is paid by February first next following, distress warrants will be issued therefor. The treasurer shall, on and after the first day of February next after the personal taxes for the last preceding year have become delinquent, collect the same, together with interest and costs of collection, by distress and sale of personal property belonging to the person against whom levied in the manner provided by law for the levy and sale of personal property on execution. Distress warrants shall be issued against all persons having delinquent personal tax for each year, and each such warrant shall include all delinquent personal taxes of the person against whom issued, unless such person shall, on or before February 1st, file with the treasurer an affidavit that he is unable, by reason of poverty, to pay any such tax, in which case distress warrants shall not issue until ordered by the county board."

Respectfully submitted,

O. S. SPILLMAN, Attorney General of Nebraska,
GEORGE LEE BASYE, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.